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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR.

ISRAEL A. ABRAMS, ET. AL., ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET. AL.,
Respondents.

PETITIONERS' REPLY AND MOTION FOR LEAVE TO FILE EXHIBITS.

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A.

Reply.

INACCURATE STATEMENTS IN RESPONDENTS' BRIEF

Respondents call attention (p. 3) to the findings of fact by the District Court as if it dealt with petitioners' objections to the report of the Commission. These findings were limited to that part of the report which dealt with "allowances" and had no ref-

erence to that part of the report which dealt with "*disallowances.*" The findings and order were confined to the allowances, and the objections to the report were disposed of *on the jurisdictional question,* the Court having taken the position (R. 9) that *no matter what the evidence showed* as to the value of petitioners' services, *it was without jurisdiction to go above the zero limit.* A separate order was entered relating to the objections and disallowances (R. 124, 125).

Respondents state (p. 12) that while this record contains only a "narrative statement" the Commission had the "complete" record and because of this it had "first hand information" when it denied petitioners' fees which "two courts have declined to overturn." The impression is gained from such an argument that two courts have passed on the merits of the claim. *The contrary appears from the record.* The District Court denied compensation *on the sole ground that it had no jurisdiction* to go above the zero limit of the Commission no matter what the evidence showed (R. 9). The Circuit Court of Appeals justified the order of the trial court on the ground (R. 153) that "the evidence upon which" the Commission's findings were passed "was not before the District Court". *It is now conceded by the respondents that the Court was mistaken* (p. 18) and they offered an explanation as to what *they think* the Court meant. We will later show that the explanation is fallacious.

MISCONCEPTION OF PETITIONERS' POSITION

It was not petitioners' position that in arriving at a "maximum limit" of the total burden of the debtor's estate in connection with the reorganization, the Commission had no right to *consider* the individual applications for fees and expenses. Petitioners' point on that question was that while the Commission had the right to consider the individual applications in connection with its

total "maximum limit," it had no right to order the individual allowance and particularly the *disallowances* under the guise of fixing a "maximum limit" and that the *disallowances were a judicial determination* which it had no jurisdiction to consider and fix.

FACTUAL AND LEGAL DETERMINATIONS

Respondents cite the *Silver* case (p. 26) on the point that questions of allowances of fees are "mainly questions of fact" and not *legal* questions. The question as to *the amount of the allowances is a factual determination, while the question whether* **any** *allowances should be made is a legal determination* (*Re American Mail Line,* 115 F. (2d) 196, 198 C. C. A. 9).

THE WORD "NOTHING" DOES NOT GO HAND IN HAND WITH THE WORD "MAXIMUM".

The petitioners cited authorities (pp. 22, 24) on the point that the word "nothing" cannot be stretched to "maximum" and that jurisdiction to fix a "maximum limit" does not embrace fixing a limit of "nothing." The only answer in respondents' brief is the bare statement (p. 15) that "there is no merit in the suggestion." This is, of course, *their* "suggestion" and it is obvious that it is without merit.

THE COMPLETE RECORD WAS BEFORE THE DISTRICT COURT

The petition pointed out (pp. 29, 30) that the District Court had the complete record before it and that the Circuit Court of Appeals was *clearly mistaken* in that respect when it based its opinion on the point that the record was not before the District Court. The respondents *concede* (pp. 17, 18) that the record was before the District Court. They offered "a probable explanation" that the Circuit Court *meant* that the Commission "had personal knowledge of the participation by petitioners and their counsel

in the hearings before it." How this explanation may be reconciled with the statement of the Court (R. 155) that "the evidence upon which this finding was made was not before the District Court," is beyond our imagination. Trustees should act impartially and it is not the duty of the respondents, as trustees, to favor one class of creditors or attorneys against the other, and they should not seek to distort statements. What personal knowledge did the Commission have of petitioners' participation and services which was not available to the District Court? We are annexing a motion to this reply for leave to file as Exhibits "I" and "II" the printed record of the hearings before the Commission in which petitioners participated. That record shows that the hearings were had before Commissioner Porter, Director Sweet and Examiner Jamieson. (See Exhibit "II", p. 547.) Division 4, which passed on the fee question (R. 39) consisted of Commissioners Porter, Mahaffie and Miller, so that *two out of the three Commissioners* who originally passed on the fees, *gained their information from the stenographic report which was also presented to the District Court.* The petition for review before the *entire* Commission (R. 81) was denied by the entire Interstate Commerce Commission (R. 103). It appears, therefore, that the Commission had to rely on the same stenographic report which was presented to the District Court, if it did examine the record in connection with such application.

DISTINCTION BETWEEN 77 AND 77B Petitioners distinguished between Section 77 and Section 77B (pp. 31, 32). Respondents' answer (p. 20) cites 77B cases. It is obvious that they are not applicable. The only 77 case which is cited relates to an *interim allowance* where the Court reserved the subject matter to the final hearing and has no remote application to the question presented.

DELEGATION OF JUDICIAL DUTIES In answer to the point that Congress was without power to delegate judicial powers to the administrative body and that the Act should be construed in a way that no such delegation was made, counsel for respondents cite cases on the point that delegation of "quasi-judicial functions" are proper. It is apparent that their answer is not responsive. The lengthy quotation (pp. 21, 22) from the *Sunshine* case throws no light on the question involved, for there "appellant has received all the judicial review to which it was entitled" while here, *the trial court refused to consider the evidence* on the question whether the Commission acted arbitrarily because of its mistaken idea that it was without jurisdiction, and the Circuit Court of Appeals affirmed the decision of the trial court *on its mistaken conception that the evidence was not presented to the District Court.* It is demonstrated, therefore that *petitioners did not have "the judicial review" to which they were entitled.* In the *Sunshine* case the Court said that "the functions of the Court cease when it is ascertained that the findings of the Commission meet the statutory test." In order to ascertain this it was necessary for the trial court, in the first instance, and for the reviewing court, in the second instance, to examine the evidence and to see if the findings have any "basic support" in the evidence (*Morgan* v. *United States,* 298 U. S. 468, 480). This court also said in *Tagg Bros.* v. *United States,* 280 U. S. 420, at page 442:

> "It has been settled in cases arising under the Interstate Commerce Act that *if an order rests upon* an erroneous rule of law * * * or is based upon a finding made without evidence * * * or upon *evidence which clearly does not support it* * * * *the order must be set aside.*" (Italics ours.)

THE QUESTION WHETHER AN ADMINISTRATIVE ORDER WAS CAPRICIOUS CALLS FOR AN EXAMINATION OF THE RECORD.

The fact that two courts found that the services of petitioners were not beneficial to the estate is urged in support of the denial of the petition. We have shown above that the mere findings of the Commission without a statement of the basic facts were insufficient and that neither the District Court nor the Circuit Court of Appeals ever passed on the question whether the evidence supported the Commission's findings.

THE RECORD DOES NOT SUPPORT THE COMMISSION'S FINDING

Under point 3, respondents contend (pp. 16, 17) that the record supports the Commission's finding. They refer to the "narrative statement" and conclude that "it hardly seems possible that upon such a record counsel would urge that the action of the Commission in concluding that the services were of no value to the trust estate was arbitrary action." In the annexed motion we ask leave to file Volumes *I* and *II* of the printed record of the evidence before the Commission as Exhibits *I* and *II* pertaining to the plan which petitioners claim was abandoned because of their efforts (Exhibit *I*, pp. 401-420; Exhibit *II*, pp. 660-661, 667-668, 679, 682, 725 and 809-825). These exhibits show the examination of the witnesses by petitioners' counsel and his argument. This record also shows (p. 629) that at the hearing of June, 1937 counsel for the Institutional Groups urged the adoption of the debtor's plan as "fair and feasible." He said (p. 630): "We are, therefore, *still willing to acquiesce in the plan* as a vehicle of prompt reorganization at this time." This record shows that the only parties who objected to that plan because it was not feasible (due particularly *to the cumulative interest on the general mortgage and cumulative features* in the Fifty-Year Mortgage, which threatened to wipe out the

new common stock to be given in exchange for the Adjustment Mortgage Bonds) was petitioners' counsel (pp. 405-406).* The record also shows (p. 680) that because of these features in the plan the parties who originally claimed that the plan was fair and feasible *conceded that it was not feasible.* In fact, the President of the railroad, in answer on cross-examination by petitioners' counsel (pp. 644, 645), *denied that he ever stated that the plan was feasible."* He said: "I did not say it was feasible." The same parties who sponsored the debtor's plan from August, 1935 to September, 1937 and who disregarded the points urged by the petitioners' counsel at the hearings, later admitted (p. 680) that it was necessayr to change the cumulative features of the 50-year bonds. In the face of this, the statement that the Commission's findings are supported by the record cannot be reconciled with the record.

THE WRIT SHOULD BE ISSUED The reasons stated in the petition for the issuance of a Writ of Certiorari were not obviated by anything which was stated in respondents' brief. They admit that many reorganizations of railroads are now pending; that Section 77 (c) (12) has never been construed by any other courts. The opinion is irreconcilable with the accepted law relating to administration of the Act of Bankruptcy, and the Writ should be issued to settle the practice and to afford relief to the petitioners who were unjustly denied their rights.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioners.

* It was also urged by petitioners' counsel that the entire plan was not feasible due to the fact that it left all existing fixed obligations in the same condition, and the railroad would emerge from this reorganization in a better position than when it emerged from the 1928 reorganization (Exhibit I, pp. 404-405). This was changed by the subsequent plan of the Institutional Groups (Exhibit II, p. 699) and was also changed by the final plan as approved by the Commission.

B.

Motion for Leave to File Exhibits.

Now come Israel A. Abrams, *et al.*, petitioners, by Meyer Abrams, their attorney, and move for leave to file instanter a copy of Volumes I and II of the printed Record filed in the United States Circuit Court of Appeals for the Seventh Circuit in appeal taken by the petitioners from the merits of the plan as Exhibits I and II and nine copies of petitioners brief in said appeal as Exhibit III as per Suggestions in Support of Motion.

MEYER ABRAMS,
Attorney for Petitioners.

Suggestions in Support of Motion.

The Circuit Court of Appeals considered petitioners' brief on the merits in the appeal taken by them from the approval of the plan in connection with the petition for rehearing (R. 158). It considered the brief on the merits because it was contended below that the evidence was not before the District Court. The brief on the merits discussed that evidence (pp. 23, 24, 25) and the brief was filed in order to demonstrate to the court that it was mistaken when it stated in its opinion that the evidence was not before the District Court. These points are discussed in respondents' brief. We stated in the petition (p. 35) that we intended to file the motion for leave to file the exhibits. Respondents' brief makes this motion of the utmost importance in view of their contentions (p. 16) that the "narrative statement" does not entitle the petitioners to the relief, and in view of their further statement (p. 18) that the Commission had first hand information which was not available to the District Court. The follow-

ing pages in Exhibits I and II which are sought to be filed here reflect the services rendered before the Commission by counsel for the petitioners (pp. 401-420, 660-661, 667-668, 679, 682, 725 and 809 to 825). A consideration of the brief which is sought to be filed as Exhibit III is also necessary with reference to the discussion in this petition (pp. 32-35).

For the foregoing reasons, we ask for leave to file the printed record consisting of Volumes I and II dealing with the evidence before the Commission as Exhibits "I" and "II" and for the convenience of the Court we ask leave to file nine copies of the Brief on the Merits as petitioners' Exhibit III.

Respectfully submitted,
MEYER ABRAMS,
Attorney for Petitioners.

Affidavit in Support of Motion.

Meyer Abrams, being first duly sworn, on oath deposes and says that he is the attorney for the petitioners on the application for Writ of Certiorari; that Volumes I and II of the printed Record filed in the United States Circuit Court of Appeals for the Seventh Circuit sought to be filed herein as Exhibits "I" and "II" are true and correct copies of the printed Record now on file in the appeal taken by the petitioners from the approval of the reorganization plan in Case No. 7611; that the Brief sought to be filed as Exhibit "III" is a true and correct copy of the original now on file in said Court.

MEYER ABRAMS.

Subscribed and sworn to before me this 22nd day of October, A. D. 1941.

YETTA GERTLER,
Notary Public.